|  |  |
| --- | --- |
| DISTRICT COURTJEFFERSON COUNTY, COLORADO 100 JEFFERSON COUNTY PARKWAY GOLDEN, COLORADO 80401 | DATE FILED: July 27, 2017 11:27 AM FILING ID: B66D91699A5C1CASE NUMBER: 2016CR1463COURT USE ONLY |
| **THE PEOPLE OF THE STATE OF COLORADO**Plaintiff, v.**GARY NICKAL**,Accused. |
| MULLIGAN BRIET, LLCPatrick Mulligan, #169811801 Broadway, Suite 1203Denver, CO 80202PH. 303-295-1500 FAX:EMAIL: Patrick@MulliganBriet.comTHE LAW OFFICE OF JENNIFER E. LONGTIN, LLCJennifer E. Longtin, #43509 2401 S. Downing St.Denver, CO 80201Ph. 303.747.6898Fax. 800.243.2691Jen@jlongtinlaw.com | Case No. 16CR001463Division: 12 |
| **OBJECTION TO CHILD HEARSAY** |

Gary Nickal, by and through counsel, objects to the testimony of Alexandra and Kameryn Nickal. Mr. Nickal requests that this Court preclude their child hearsay for lacking sufficient safeguards of reliability. The defense has no objection to the prosecution’s requested extension of time to file a Motion to Introduce Child Hearsay; should that specific motion alter any arguments made in this motion, the

defense requests additional time to amend. In support of Mr. Nickal’s request, the defense states the following:

# FACTS

1. On April 28, 2016, Officers responded to a call of a shooting death at the home of Gary and Molly Nickal in Westminster, Colorado. When police arrived, they found three young children, Alexandra Nickal (eight-years old), Kameryn Nickal (seven-years old), and Calvin Nickal (three-months old).
2. While on scene police spoke with Alexandra and Kameryn Nickal. Police conducted forensic interview with Alexandra and Kameryn this same day at the Arvada Ralston House.

# LAW

1. C.R.S. 13-25-129 provides that a child who is the alleged victim or a witness to an alleged act of child abuse, may have their statement entered into evidence when the court “finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability…”
2. The court must find a child’s statement to be reliable in order to enter the statement into evidence. *People v. Salas*, 902 P.2d 398, 401 (Colo.App. 1994). Factors to be considered in whether or not a child’s statement is reliable include: 1), the general character of the declarant; 2), the timing of the declaration and the relationship between the declarant and the witness; 3), whether the statement was

made while the child was still upset or in pain from the alleged abuse; 4), whether there is an apparent motive to lie; 5), Whether more than one person heard the statements; 6), whether the language of the statement was likely to have been used by a child the age of the declarant; 7), whether the statements were made spontaneously; 8), whether any other event occurred between the time of the abuse and the time of the statement which could account for the contents of the statement; 9), whether the statements contain no express assertion about past fact; 10), whether cross- examination could not show the declarant's lack of knowledge; 11), whether the allegation was made in response to a leading question; 12), whether the possibility of the declarant's faulty recognition is remote; and 13), whether the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented defendant's involvement. *People v. Serna*, 738 P.2d 802, 803–04 (Colo.App. 1987); *People v. Frost*, 5 P.3d 317, 323 (Colo.App. 1999); *People v. Rojas*, 181 P.3d 1216, 1218–19 (Colo.App. 2008). None of these factors are determinative, nor is this list exhaustive. *Id.* The crucial issue is that the finding of reliability be supported by the record. *People v. Rojas*, 181 P.3d 1216, 1219 (Colo.App. 2008).

1. C.R.S. § 13-90-106 indicates that children under the age of ten are presumed incompetent to testify at trial.
2. One of the key issues when evaluating child hearsay is whether there is corroborating evidence. *See People v. Rogers*, 800 P.2d 1327, 1330 (Colo.App. 1990); *See also People v. Haynie*, 826 P.2d 371, 376 (Colo.App. 1991). While such evidence is

mandatory when the child witness is not available to testify, the courts have looked to corroborating evidence to determine whether the child hearsay statements are themselves reliable. C.R.S. 13-25-129(b)(2); *Rogers*, 800 P.2d at 1330 (the court finding corroborating evidence, along with other factors, provided “sufficient safeguards of reliability.”).

1. “[T]he quantum of corroborative evidence needed to support admission of a child's hearsay statement must be enough to induce a person of ordinary prudence and caution, conscientiously to entertain a reasonable belief that the sexual abuse that is the subject of the child's hearsay statement occurred.” *See Stevens v. People*, 796 P.2d 946, 953 (Colo. 1990); *see also People v. Ayala*, 770 P.2d 1265, 1267 (Colo.1989). The court, further, may look past just the quantum of evidence necessary, and consider whether the totality of the evidence supports a finding of admitting the child hearsay statements. *See Stevens*, 796 P.2d at 953 (“Moreover, the trial court may examine the evidence as a whole to determine whether sufficient corroboration exists to warrant admission of child hearsay statements under section 13–25–129.”); *see also In the Interest of O.E.P*., 654 P.2d 312, 319 (Colo.1982) (totality of circumstances underlying child's hearsay statements demonstrated that trial court did not err in admitting statements under excited utterance hearsay exception).

# ARGUMENT

1. In this matter, the prosecution is requesting to introduce statements made by Alexandra and Kameryn Nickel.
2. On the date of the allegations in this matter, Alexandra was eight-years old while Kameryn was seven-years old. As of the filling of this motion, Alexandra is still only nine-years old while Kameryn is only eight-years old. Per C.R.S. § 13-90-106, Alexandra and Kameryn Nickal are presumed incompetent to testify at trial.
3. The Court, in order to allow Kameryn and Alexandra to testify, must make findings, supported by the record, that Kameryn and Alexandra are competent to testify, and that their testimony has the sufficient safeguards of reliability. *See* C.R.S. 13-25-129; *see also People v. Serna,* 738 P.2d 802, 803–04 (Colo.App. 1987); *People v. Frost,* 5 P.3d 317, 323 (Colo.App. 1999); *People v. Rojas,* 181 P.3d 1216, 1218–19 (Colo.App. 2008).

# CONCLUSION

WHEREFORE, Mr. Nickal, by and through counsel, respectfully requests this Honorable Court exclude the hearsay of Alexandra and Kameryn Nickal as unreliable, or, in the alternative, set a hearing to gather further information regarding the reliability of these statements. Gary Nickal makes this motion pursuant to his right to confrontation, right to due process, and all other rights accorded to an individual under both the Colorado and United States’ constitutions.

Dated: July 27, 2017 Respectfully Submitted,

 /s/

Patrick Mulligan Registration # 16981

Jennifer Longtin, #43509

The Law Office of Jennifer E. Longtin, LLC

# Certificate of Service

The undersigned does hereby certify that on July 27, 2017, she served the foregoing OBJECTION by ICCES to all opposing counsel of record.

